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No. 88-

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE BARBIZON CORPORATION,
Petitioner,

vs.

ILGWU NATIONAL RETIREMENT FUND,
SOL C. CHAIKIN, and
JOSEPH MOORE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES W. WIMBERLY, JR.
(Counsel of Record)
MONICA M. BEKKEN
WIMBERLY, LAWSON & COBB
Suite 1750, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 365-0900
Counsel for Petitioner
The Barbizon Corporation

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

39 pp

QUESTIONS PRESENTED

1. Whether a court may, through summary judgment, make substantive changes in statutory language under ERISA §4217, thereby unlawfully imposing retroactive liability on an employer and effecting changes in other parts of the statute.

2. Whether a court may decide on a motion for summary judgment that there was no decline in contributory operations at a facility under ERISA §4217(a)(2) when the stipulated facts show an 81% decline in contributions to the Fund.

3. Whether a court may refuse to find a facility closing under ERISA §4217(a)(2) when the stipulated facts show that the employer closed its plant, terminated all employees, sold the property and most of the equipment, lost all of its productive capacity, and thereafter obtained needed goods from non-union sources.

4. Whether a court may decide on a motion for summary judgment that an obligation to contribute for work performed under a collective bargaining agreement did not cease where the stipulated facts show that the applicable plant closing agreement and master agreement expired prior to the effective date of MPPAA and that a new master agreement covering other operations was not agreed upon until a year later.

RULE 28.1 LIST

Pursuant to Supreme Court Rule 28.1, Petitioner, The Barbizon Corporation, states that it has no parent companies, subsidiaries (other than wholly owned subsidiaries), or affiliates.

LIST OF PARTIES

The parties to the proceeding below were The Barbizon Corporation (Plaintiff-Appellant) and the ILGWU National Retirement Fund, Sol C. Chaikin, and Joseph Moore (Defendants-Appellees).

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Supreme Court Rule 20, The Barbizon Corporation ("Barbizon") respectfully prays that a writ of certiorari issue to review an opinion of the United States Court of Appeals for the Second Circuit dated March 18, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 842 F.2d 627 and is reprinted in the Appendix to this Petition at App. A. The denial of rehearing by the United States Court of Appeals for the Second Circuit is reprinted in the Appendix at App. C. The opinion of the United States District Court for the Southern District of New York, dated August 10, 1987, is reported at 667 F. Supp. 994 and is reprinted in the Appendix at App. B.

JURISDICTION

The District Court had jurisdiction over this action under 28 U.S.C. §§1331 and 2201. The Court of Appeals had jurisdiction under 28 U.S.C. §1291. The judgment of the Court of Appeals is dated March 18, 1988, and was entered on that same date. A timely Petition for Rehearing in banc was denied on June 2, 1988. This Court has jurisdiction under 28 U.S.C. §1251(1). By order dated August 18, 1988, Petitioner was granted until September 30, 1988, to file its Petition for a Writ of Certiorari in this matter.

STATUTE INVOLVED

United States Code, Title 29:

§1397. Application of 29 U.S.C. §§1381 et seq. in case of certain pre-1980 withdrawals; adjustment of covered plan.

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable:

(1) To work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or

(2) To work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a).

STATEMENT OF THE CASE

This matter was submitted to the lower court on a stipulated record and decided on cross-motions for summary judgment. The action arose as a result of a demand by the ILGWU National Retirement Fund ("the Fund") that Barbizon pay to the Fund in excess of $1.5 million in withdrawal liability, primarily based upon Barbizon's termination of its operation at Provo, Utah, in June of 1980. Prior to that time, Barbizon of Utah, Inc., a wholly owned subsidiary of Barbizon, was primarily engaged in the manufacture of finished garments for Barbizon. App. F, at A44. Barbizon asked for a declaratory judgment under 28 U.S.C. §2201 and under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), and the Deficit Reduction Act of 1984 ("DEFRA"), requesting that the court declare that certain exceptions to amounts of

withdrawal liability be applied.[1] The matter was submitted on a stipulated record, but the lower court refused to apply the applicable exceptions spelled out in the statute.

The withdrawal liability in question was triggered by the aforementioned closure of Barbizon's Provo manufacturing facility for economic reasons, including high labor costs, excessive transportation costs due to the location of the Provo facility, and the lack of a West Coast market. App. E, at A38. The announcement of the plant closure was made on November 30, 1979 to the ILGWU-represented employees at Provo, App. D, at A34, who at the time were covered by master and supplemental collective bargaining agreements in effect from February 1, 1977, until January 31, 1980. App. R, T, at A96, 123. The supplemental agreement was separate from any other agreements covering employees of other Barbizon subsidiaries, and it contained different benefits, hours of work, rates of pay, and other terms of employment. App. E, at A40-41. In fact, the production employees at the Provo plant were considered a separate bargaining unit. App. E, at A40. Barbizon of Utah also maintained its own separate payroll, bookkeeping, bank accounts, legal counsel, and real estate from other Barbizon subsidiaries. *Id.*

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1. Through ERISA §4217, Congress had attempted to eliminate the unfairness of retroactive withdrawal liability for employers withdrawing from a multi-employer pension plan, by excluding contributions allocable to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980 (the effective date of MPPAA); or to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there was a permanent cessation of the obligation to contribute before that date.

Barbizon representatives met with ILGWU representatives on March 14, 1980, to discuss the closing and ultimately entered into a separate agreement covering that matter. App. Q, D, at A90, 32. In the agreement, which was entered into on June 24, 1980, the parties agreed that the 1977-1980 Master Agreement (which had expired on January 1, 1980) would be extended until June 30, 1980, and that Barbizon's obligation to contribute to the ILGWU National Retirement Fund on behalf of work performed by ILGWU-represented employees at Provo would expire on June 30, 1980. App. Q, D, at A91, 94, 32.

The Provo plant was completely shut down for production purposes before July 1, 1980. App. H, at A48. As a result of the closing, major changes occurred in the manufacture of garments, 90% of which had been produced by the Provo factory. All of the garment inventory was subsequently obtained from independent contractors because Barbizon had lost its productive capacity (until it opened its non-union plant in Puerto Rico over a year later). App. E, Z, at A42, 214-15, 218. This was accomplished by shipping fabric to an independent contract cutter, who in turn shipped the cut fabric to other independent contractors to complete the manufacture. App. E, at A42. Barbizon had no control over the working conditions, hours, wages, shifts, benefits, seniority, or promotions of the employees in any of the manufacturing facilities owned or operated by independent contractors with whom Barbizon contracted. App. E, at A43. Neither Barbizon nor any of its subsidiaries had any partial or complete ownership of any of the domestic independent contractors with whom Barbizon contracted. *Id.* The work was con-

tracted out to union and non-union contractors as well as to Barbizon's non-union plant in Puerto Rico. App. CC, Z, at A285, 288, 214-18.

When the Provo plant closed, no production, supervisory, or management employees of Barbizon of Utah transferred to the employ of any independent contractors with whom Barbizon had contracted. App. E, at A43. Approximately two-thirds of the manufacturing equipment used at the Provo facility was sold to a West Coast buyer with whom Barbizon and its subsidiaries had no further dealings. App. E, at A41. Some of the specialized equipment was sold, leased, lent, or stored. *Id.*

On June 17, 1983, the Fund demanded that Barbizon pay the amount of $1,590,139 as withdrawal liability under the newly-enacted MPPAA, primarily based upon Barbizon's termination of its operation in Provo. App. I, D, at A49, 29. In accordance with its rights under the statute, Barbizon thereafter responded at length to the demand, setting forth in detail the basis for its dispute with the assessment, and requesting certain information relevant to the demand as well as a review. App. J, D, at A54, 30. Among other things, Barbizon asked that the Fund recalculate its withdrawal liability on a basis which would exclude contributions properly excludable under 29 U.S.C. §1397. *Id.*

The Fund responded to Barbizon's request for review on or about December 8, 1983, but did not alter its demand for payment. App. K, D, at A64, 30. It did not respond to Barbizon's statutory defense.

Barbizon thereafter timely demanded arbitration of the disputed amount on February 1, 1984. It again raised

the applicability of 29 U.S.C. §1397, but the Fund did not respond in writing. App. L, D, at A66, 30. Once Congress voided the retroactivity of MPPAA by enacting DEFRA, Barbizon again demanded arbitration of the dispute by letter dated September 18, 1984. App. M, at A70. The Fund failed to respond to that request.

Throughout the relevant period of time, Barbizon has paid and continues to pay each quarterly installment assessed by the Fund. App. D, at A29. Such payments are required pending arbitration under 29 U.S.C. §1401(d).

In view of the parties' inability to resolve this dispute, an action for a declaratory judgment was brought by Barbizon in district court. An appeal to the United States Court of Appeals for the Second Circuit followed, resulting in an affirmance of the District Court's decision.

REASONS FOR GRANTING THE WRIT

The court below held that the closing of Barbizon's Provo plant, the termination of its several hundred unionized employees, the sale of the plant and most of the equipment, and the subsequent production of the same work by non-union sources was a "non-event" under MPPAA not subject to complete or partial withdrawal liability or to the corresponding exemption under ERISA §4217. The basis for this finding was that from a functional perspective, Barbizon "did not remove any productive operations from the coverage of the pension plan." App. A, at A11-12. This is contrary not only to the stipulated facts in this case, but to the court's own finding that the pension fund contributions did in fact decrease.

App. A, at A12. Moreover, it contravenes the explicit provisions of the statute, recent rulings of this Court applying a plain meaning to the language of the statute, and public policy considerations governing the ability of funds to assess partial withdrawal liability in the future when employers shift work from unionized plants to non-union sources.

In the usual case, the pension fund would be arguing Barbizon's position herein; the pension fund would normally be arguing that the facts described above constitute an "event" under MPPAA such that withdrawal liability should be imposed. However, because this case also involves application of a specific exception to certain withdrawal liability for events occurring prior to MPPAA's effective date, the Fund has argued in favor of a ruling which is of short-term expedience in assessing the instant liability, but which will have disastrous results in future cases. Indeed, as will be shown, this exact situation is expressly covered by the partial withdrawal rules, which impose liability when an employer's contribution obligation partially ceases but the employer continues to perform work in the jurisdiction or transfers it to another location. Since the parties agree that §§4217 (the exemption statute) and 4205 (partial withdrawal rules) are governed by the same principles, if the exemption is not applied to the facts herein, then neither this nor any other fund will be able to declare partial withdrawals in similar plant closings in the future. These rules should not be rewritten in this case merely because the §4217 exemption from liability for events occurring prior to September of 1980 is also invoked by the stipulated facts.

I. The Decision Below Raises Important Questions Regarding the Right of a Fund to Refuse to Apply a Statutory Exemption Under ERISA §4217 When the Stipulated Facts Show the Closing of a Facility and a Decline in Contributory Operations at That Facility Prior to the Designated Cutoff Date.

Prior to 1980, an employer's liability to a multi-employer pension plan was limited to those contributions required by the applicable collective bargaining agreement. An employer who ceased contributing to or withdrew from the plan had no liability unless the plan itself terminated within five years following the employer's withdrawal with insufficient assets to discharge vested benefits. In September of 1980, Congress enacted MPPAA, which changed this scheme and imposed unexpected liabilities on employers by permitting a multi-employer pension plan to demand payment of an amount based on the withdrawing employer's proportional share of the unfunded vested liability of the plan, determined from the employer's "contribution base" (the total of an employer's contributions over a period of years before the withdrawal).

Because Congress wished to alleviate some of the initial unfairness of such liability (which would necessarily be based in part on contributions made before the enactment of MPPAA), it adopted two exceptions to the general rule, codified in 29 U.S.C. §1397(a), ERISA §4217(a), *supra*. Briefly, if an employer's obligation to contribute to a plan under a collective bargaining agreement ceased prior to MPPAA's enactment or if a facility closed or an obligation to contribute for work performed

at a facility ceased prior to its enactment, then an employer could exclude from the withdrawal liability calculation contributions attributable to that collective bargaining agreement or to work performed at that facility.

Application of either one of these exceptions entitles an employer to a reduction in withdrawal liability. Both exceptions apply to the stipulated facts herein, as shown below and in II, *infra*.

A. The court below has decided an important question under ERISA in a way that conflicts with recent decisions of this Court favoring a plain meaning of statutory language under ERISA.

The parties stipulated on the record that Barbizon closed its Provo plant prior to September 26, 1980. App. D, at A31, 34, 35. Under §4217(a)(2), contributions allocable to work performed "at a facility" which closed before September 26, 1980, may not be taken into account in determining an employer's withdrawal liability. Application of this language to the stipulated facts shows that Barbizon is entitled to relief.

The term "facility" is not defined in the statute. Absent any statutory definition, the plain meaning of the statute must govern.

Indeed, courts prefer the plain meaning of a statute. *Statutes and Statutory Construction* ¶¶47.27, 47.28 (4th Ed. 1972). In two recent cases, this Court has favored a plain meaning in interpreting other sections under ERISA. Thus, in *Laborers' Health and Welfare Trust Fund for Northern California et al. v. Advanced Light-*

weight Concrete, Inc., ... U.S. ....., 108 S.Ct. 830, 98 L.Ed.2d 936 (1988), the Court adopted the plain reading of the enforcement provisions of ERISA over policy arguments favoring a broader interpretation. According to the Court, Congress' intent was so plain as to preclude policy arguments to the contrary. More recently, in *Mackey et al. v. Lanier Collections Agency & Service, Inc.*, ... U.S. ....., 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), the Court emphasized that it is necessary to look at the language of ERISA and its structure in determining the intent behind the original enactment.

Other courts have followed this lead. *See, Massachusetts Laborers' Health and Welfare Fund, et al. v. Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988), (adoption of plain meaning for the term "employer," based upon the plain language of ERISA and the effect that a broader definition might have on other sections of the statute).

In interpreting §4217 of ERISA, the plain meaning dictates a different result than that reached by the court below. In fact, other courts and arbitrators have specifically adopted a plain meaning for the term "facility." For example, in *United Mine Workers' 1974 Pension Plan and Williamson Shaft Contracting Co.*, 6 EBC 1593 (Pritzker, 1985), the arbitrator relied upon the dictionary definition of "facility" as "something (as a hospital) that is built, installed, or established to serve a particular purpose." *Id.* at 1603-4.

In *May Stern & Co. and Western Pennsylvania Teamsters and Employers Pension Fund*, 8 EBC 2202 (1987), Arbitrator Nagle, formerly executive director of the Pension Benefit Guaranty Corporation ("PBGC"),

held that each of a furniture retailer's stores and warehouses was a separate "facility" for MPPAA withdrawal liability purposes, relying upon the normal usage of the term and the separate economic function and physical separateness of the various locations:

> Moreover, I believe that the fund's emphasis upon the May Stern operation being a "single economic unit," and its warehouses not being "independently viable economic units," misses the point. I assume that this emphasis derives from the previously cited language in the PBGC opinion letters and MPPAA's legislative history with respect to a "facility" being regarded as "an economic unit" of the employer's business—language which in turn was clearly derived from the Standard Industrial Classification's definition of "establishment." There is nothing about that language that suggests that an "economic unit" must be "independently viable" or that a separate location may not be an "economic unit" merely because it operates as part of a larger business organization. On the contrary, I believe it is clear from the Standard Industrial Classification as well as from the Supreme Court's decision in *Phillips v. Walling* and cases following it, that *each store and warehouse in a retail chain is considered to have its own economic function in the employer's overall business, and within that context derives its identity as an "establishment" or "facility" from its permanent physical separateness. That is the concept which is reflected in the PBGC opinion letters and which I believe is appropriate to follow here.*

Id. at 2215 (emphasis added).

The plain meaning has also been followed by the PBGC. In Opinion Letter 82-33 (October 28, 1982), it held that the term "facility" in §4217, in the context of the retail food industry, ordinarily means a single store. App. GG, at A310. This was reaffirmed in Opinion Letter 86-2 (January 31, 1986), App. HH, at A313, where a separate store in a retail food chain was considered a separate facility, based upon generally accepted economic terminology under which "facility" means a discrete economic unit of an employer, and upon the longstanding definition of the term "establishment" used in the Standard Industrial Classification Manual and the definition of "facility" that Congress considered promulgating with respect to partial withdrawal rules. *See also*, Opinion Letter 82-22 (August 3, 1982). App. II, at A317.

At least two courts have rejected a more expansive definition of "facility." In *Meatcutters' Local 88 Pension Plan v. Del Monte Supermarkets*, 565 F. Supp. 27 (E.D. Mo. 1983), vac. upon jt. mot. of parties, 4 EBC 2168 (8th Cir. 1983), the court relied upon the preposition "at" in the statutory language to hold that §4217 pertains to work performed "at a facility at which all covered operations permanently ceased," meaning a single location.

Likewise, in *Central Pennsylvania Teamsters Pension Fund v. Royal Swan Foods, Inc.*, C.A. No. 84-4163 (E.D. Pa. 1985) (dis. with prej. and vac. on jt. mot. of parties as part of settlement) App. FF, at A300, the court held that the language of §4217 *precludes* a definition in which "facility" equates with all operations covered under a single collective bargaining agreement. Cf., *Walt's Supermarkets, Inc. and Indiana Area Food and Commercial Pension Plan*, 4 EBC 1494 (Hannan, 1983) (arbitrator's expanded definition of "facility" was based upon express

contract provision defining that term); *Buy-Low of Cassopolis, Inc. and Board of Trustees, Food Workers' Pension Plan,* 5 EBC 2641 (Bowles, 1984) (arbitrator's definition turned on past practice of the parties recognizing a more extensive meaning of facility).

In the instant case, the separateness of the Provo plant is undisputed on the record. A separate supplemental agreement covered work performed by ILGWU-represented employees in Provo. App. D, R, S, at A31, 96, 113. The parties to the Provo agreement (Barbizon of Utah and The Barbizon Corporation) are different from the parties to the agreement covering work performed by ILGWU-represented employees in Pinebrook, New Jersey. App. R, S, at A97, 114. Holidays and holiday pay under the two agreements are different. App. R, S, at A104, 117. Employee benefits are different. App. R, S, at A109, 121.

Moreover, the Provo factory was owned by Barbizon of Utah, Inc. App. E, at A37. Its business was the manufacture of finished garments designed by others and minimal retailing, while The Barbizon Corporation was involved primarily with designing and wholesaling garments produced by others. App. F, at A44. All records, including payroll, bookkeeping, and bank accounts, were separately maintained by Barbizon of Utah. App. E, at A40. Clearly, the Provo factory was a physically separate installation at a single location and was different from every other operation owned or operated by Barbizon of Utah, a separate economic unit of The Barbizon Corporation.

Even union counsel described the various installations operated by Barbizon as "plants" or "facilities," in

a brief filed by the ILGWU with the National Labor Relations Board on June 22, 1983. These references indicate that "facility" is a synonym for "plant," "factory," or "establishment." App. X, at A202-4. In fact, in June of 1983, at a time when he was a trustee of the Fund, Wilbur Daniels stated in sworn testimony before the National Labor Relations Board that Barbizon's separate plants were "facilities," using that term as a synonym for "plant." App. Y, at A208-12. The Fund's application to the PBGC for special withdrawal liability rules in 1982 even refers to a manufacturer's inside shop as a production "facility." App. AA, at A235. Indeed, Defendant Chaikin himself publicly described the Provo plant as a "facility" in a letter to the *New York Times* several months after the closing of the plant. App. LL, at A329. Thus, both the union and Barbizon clearly regarded the Provo plant as a "facility," even *after* MPPAA's enactment.[2]

Rather than relying on the plain meaning of "facility" and applying it to the Provo plant, the decision below contrived the following definition: "It is that portion of Barbizon's business which was composed of the productive operations that were formerly performed by the workers at the Provo plant and that, after June 30, 1980, were performed by outside contractors." App. A, at A11. Not only does this definition ignore the rules of statutory construction, but (as will be shown, *infra*), it actually confuses this requirement with the alternative requirement of §4217(a)(2).

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2. Indeed, the parties were in agreement in the lower courts that the term "facility" means the same under §4217 as it does under the rules governing partial withdrawals, where partial withdrawal liability is imposed when an employer closes a facility and transfers the work to another location (as explained more fully, *infra*).

The Court primarily relies upon *Paperworkers' Local 286 Pension Plan and Kardon Industries, Inc.*, 6 EBC 2398 (1985), for the proposition that a shift in operations from one location to another may constitute a continuation of operations "at a facility." However, the facts in that case showed that there was indeed a continuation of the same operation; the employer transferred its operations, employees, and equipment intact from Philadelphia to New Jersey, only several miles away. It remained in control of the production facility, the equipment, and the employees, which were essentially identical at the new location. By contrast, Provo's production employees did not transfer to another facility, nor did the employees transfer to any independent contractor with whom Barbizon subsequently did business. Once the Provo facility closed, production previously performed in-house was contracted out to many different contractors located throughout the eastern United States and abroad. App. E, at A41. The closest such independent contractor was more than 1,000 miles away from Provo. *Id.*

Since Barbizon lost its entire productive capacity, laid off all of its employees, sold all but a fraction of its equipment, and lost control over production schedules, costs, and quality, no shift in operations occurred within the meaning of *Kardon Industries.*

In fact, in *Royal Swan Foods, supra,* the court expressly relied upon the fact that the company went from an in-house distribution operation to the use of purchased goods from independent contractors in finding a facility closing. The facts showed that before the facility in question closed, it supplied goods to other facilities, but afterwards, the goods were purchased from other sup-

pliers. Moreover, the parent company, which made contributions to the Fund on behalf of all covered employees, did not effect a complete withdrawal until after the effective date of MPPAA. Even though the in-house operation was replaced by the use of outside contractors, and despite evidence that some equipment and two former employees were transferred to another subsidiary, the court found no significant "shift" of operations. Accordingly, it found that a facility closing had occurred under §4217.

The decision below thus departs from well-established authority by this Court and others mandating a plain reading of the provisions of ERISA. Provo was clearly a "facility" under the statute, and the facts show no shift in operations. Quite the contrary, the facts show that the Provo facility, which had manufactured over 90% of the garments sold by Barbizon, was completely shut down prior to September 26, 1980. App. D, at A34. Based on these facts, the exemption of §4217(a)(2) must be applied.

B. A fund may not refuse to apply the "facility closing" exemption of §4217(a)(2) when the stipulated facts show a decline in contributory operations at a facility.

ERISA §4217(a) is written in the alternative—either there must be a closing of a facility (as shown, *supra*) *or* the obligation to contribute for work performed at the facility must have ceased. The parties stipulated on the record that "Barbizon's obligations to make contributions under a collective bargaining agreement to the Fund on behalf of employees located at Plaintiff's Provo,

Utah, plant ceased prior to September 26, 1980." App. D, at A34. Clearly, then, the Fund admitted that there was a permanent cessation of the obligation to contribute for work performed at the Provo facility.

The statute only requires that there be a permanent cessation of the obligation to contribute for work performed *at a facility*. As shown, *supra*, the Provo plant was a facility as defined by the PBGC, courts, and arbitrators, and Barbizon is therefore entitled to the relief provided in §4217.

The court below concluded that the Provo plant was not a "facility." However, it nevertheless recognized that that did not end the inquiry since Barbizon could still recover if it established a reduction in contributory operations at Provo as well as other locations, i.e., a reduction in contributory operations at the Provo "facility" under the court's expansive definition.

In analyzing this part of the statute, the lower court relied exclusively on case authority in which the evidence showed no decline in contributory operations. App. A, at A10-12. It found that Barbizon "did not remove any productive operations from the coverage of the pension plan" when it closed its Provo plant and terminated its workers, App. A, at A11-12, while at the same time finding that Barbizon "did benefit from a reduction in the amount of contributions that it paid to the Fund after closing the Provo plant . . ." *Id.* at A12.

The record shows that productive operations were removed when Barbizon closed the Provo plant. Based on the figures provided by the Fund itself, there was at least an 80% decline in contributions because of the

Provo closure.[3] In fact, this enormous decline is actually greater than the numbers reflect because such factors as annual wage rate increases and increases in contribution percentages are not taken into account. The decision below failed to address this stipulated evidence.

The evidence showing a dramatic shift from contributory to non-contributory operations is underscored by evidence of where the work went. After Provo closed, a significant amount of the work was performed by non-union contractors (i.e., non-contributory operations), as shown in the ILGWU audits. During the audit year immediately following the Provo closure (February 1, 1981, to January 31, 1982), liquidated damage payments of $190,356 were due for work performed by non-union contractors,[4] App. CC, at A286, 288, compared to only $31,067 in contributions to the Fund for union operations in 1981. App. DD, at A296. In fact, the stipulated record is replete with evidence of this shift. For example, the evidence shows that the union successfully pursued a grievance demanding liquidated damages in excess of

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3. This is based on evidence showing that contributions on behalf of union contractors increased by only $26,506 between 1979 and 1980 (the year Provo closed), while the decrease attributable to the Provo closure was over $140,000. App. DD, at A294-5. The difference between the two thus shows a net loss of $113,494 in contributions, which is equivalent to an 81% decline in contributions immediately following the Provo closure. This decline is reinforced by the figures provided by the Fund which show actual contributions made—$171,422 in 1979; $70,250 in 1980; and $31,067 in 1981. App. DD, at A296. Thus, there was a 59% decline in contributions during 1980; if contributions made that year for Provo work are excluded, the figure shows an 80% decline in contributions. Comparing contributions for the year preceding and the year following the Provo closure, contributions declined from $171,422 in 1979 to $31,067 in 1981—a decline in contributions of over 81%.

4. Liquidated damage payments are due to the *union* and not to the fund and do not constitute contributory operations. App. V, at A187-8; App. Z, at A215-16.

$200,000 due to Barbizon's use of non-union outside contractors and sought additional damages for Barbizon's operation of a non-union shop in Puerto Rico. App. Z, at A215. Since the authority relied on by the court is based on the lack of any decline in contributory operations, it cannot stand in light of the record.

As mentioned, the decision below is rife with inconsistencies. Thus, it initially states that there was no loss of productive capacity when Provo closed. App. A, at A11. However, the court also finds that there was a reduction in the amount of contributions which Barbizon paid to the Fund after Provo closed. App. A, at A12. Based on these two findings, a significant amount of the production clearly had to have come from non-union sources, which is inconsistent with the finding that there was no loss of productive operations from the coverage of the union pension plan when Provo closed. App. A, at A11-12.

In analogous contexts, these facts have triggered the applicable statute. For example, in *Dunkard Creek Coal, Inc. and United Mine Workers of America 1950 Pension Plan,* 9 EBC 1825 (Hughes, 1988), the arbitrator found that a complete withdrawal had occurred when an employer's contribution obligation ceased after it continued to conduct coal brokerage operations with non-unionized employees, following cessation of its mining operations with unionized employees.[5] As in the instant case, a change from union to non-union operations was the triggering event for imposition of the liability (or exemption from liability).

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5. As with the exemption under §4217, the operative factors for a complete withdrawal are whether an employer permanently ceases to have a contribution obligation or whether it permanently ceases covered operations.

In fact, the PBGC has held that withdrawal liability is incurred when an employer contracts out the work on which contributions to a multi-employer plan are based. (Opinion Letter 85-32, App. JJ, at A319.) In the instant case, there was clearly a loss of productive operations from the coverage of the union pension plan when Provo closed and contracted out its work, and as conceded by the Fund in its briefs to the lower court, the §4217 exemption applies to "a switch from contributory to non-contributory operations," or to a "defined reduction" in contributory operations. App. MM, at A333-5. Furthermore, the Fund in its submission to the PBGC emphasized that partial withdrawals [and hence the §4217 exemption] apply where "an employer *does* take a piece of the industry with him by continuing to compete on a non-contributory basis . . . ." App. AA, at A246. The lower court ignored these concessions by the Fund.

The fact that some of the work was contracted out to union contractors does not alter this conclusion. This precise issue has been addressed in the context of the construction industry, where (as with a partial withdrawal) an employer is considered to have withdrawn from a plan (under ERISA §4203(b)(2)) when it reduces the plan's contribution base by continuing to perform covered work without an obligation to contribute for that work. In *H. C. Elliott, Inc. v. Carpenters' Pension Trust Fund for Northern California*, 663 F. Supp. 1016 (N.D. Calif. 1987), the Court rejected an argument by the employer that it should be relieved of withdrawal liability because 80% of the work went to *union* contractors:

> Elliott's contention that 80% of its recent carpentry work has resulted in contributions to the Trust Fund cannot relieve it of withdrawal liability unless

> this court is willing to make wholesale changes to the statutory language adopted by Congress. Section 1383(b) is simply devoid of any suggestion that a 'small' erosion in contributions can either be forgiven or result in a reduced liability. Under the statutory scheme, an employer either 'ceases to have an obligation to contribute under the plan' or it does not, and an employer either 'continues to perform work' or it does not. If these criteria are met, withdrawal liability is imposed. This might be a different case if 100% of Elliott's carpentry subcontracting work since the time of its withdrawal had been performed by union subcontractors. Such a case would not involve any erosion of contributions. However, the court is not presented with that question.
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> Nor can it be said that such a bright line test is inconsistent with Congressional intent. It serves to prevent employers from 'inching away' from a pension trust fund, which indeed appears to be what has happened here. . . .

8 EBC at 2126-7. In fact, the Fund has represented to the PBGC that where there is a shift to non-union work "withdrawal liability is both appropriate and necessary;" hence, the pre-MPPAA exemption would apply. App. AA, at A246.

Based on all of the above, Barbizon is entitled to the exemption in §4217(a)(2).

C. The Court below has decided an important question under ERISA in a way that conflicts with decisions of this Court defining the limitations of summary judgment.

Not only has the court below disregarded clear statutory language applicable to the facts on the stipulated

record, but it has decided this matter on motions for summary judgment. Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is only appropriate where there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. If there is a genuine issue as to a material fact, the case should go to trial. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); 6 *Moore's Federal Practice*, ¶56.04[1]. In making such a determination, inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *U.S. v. Diebold, Inc.*, 369 U.S. 654 (1962). Disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). As this Court has noted:

> . . . [S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 20 L.Ed.2d 569, 88 S.Ct. 1575 (1968), we . . . observed . . . that
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> > [i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. 391 U.S., at 288-289, 20 L.Ed.2d 569, 88 S.Ct. 1575.

Id. at 211-12.

Summary judgment to the Fund was inappropriate on the stipulated record herein. Material, uncontroverted evidence was presented of a substantial decline in contributory operations which would entitle Barbizon to the exemption at issue. At the very least, an issue was created as to the extent of any such decline. In either event, summary judgment was improper.

II. The Decision Below Raises Important Questions Regarding Future Assessments of Withdrawal Liability for Partial Withdrawals and in Other Contexts.

The decision of the court below has consequences far beyond those resulting from a single instance of the denial of an exemption to a single employer who closed a single plant. By refusing to apply the exemption of §4217(a)(2) as a result of the reduction in contributory operations, the lower court has really said that closing an establishment such as the Provo plant and shifting a major portion of the work to non-union labor is a "non-event" under MPPAA. Under the law of this case, funds would be precluded from imposing liability in other contexts, such as post-MPPAA partial withdrawals, and not just those involving application of the §4217 exemption, as here.

A partial withdrawal occurs when, during a plan year, an employer's contributions to the plan decline by a specified amount *or* the employer's contribution obligation partially ceases. 29 U.S.C. §1385(a). A partial cessation of the obligation to contribute can occur in one of two ways: either (1) the contribution obligation expires under one or more but less than all of an employer's collective bargaining or related agreements, but the employer continues to perform work in the jurisdiction of

the type for which contributions were previously required or transfers the work to another location, or (2) the contribution obligation ceases with regard to one or more but less than all of the employer's facilities, but the employer continues to perform work at the facility of the type for which the obligation ceased. The practical application of this type of withdrawal was explained by Senator Williams, a co-sponsor of MPPAA:

> Examples of these two situations are where an employer bargains out of making contributions to a plan that the employer was previously required to make under a collective bargaining agreement that is otherwise in effect with respect to other requirements, or, where work that was undertaken at one geographic location for which contributions were made is transferred by the employer to another of his plants at a different geographic location where contributions to a plan for the work performed are not required.

126 Cong. Rec. 23287 (August 26, 1980). Clearly, MPPAA contemplates that partial withdrawals can result from a shift from in-house production to production by independent contractors, as was done here. Moreover, the §4217 exemption applies to both complete and partial withdrawals occurring prior to September 26, 1980.

However, accepting the lower court's broad meaning of the term "facility," liability could not be imposed upon an employer who continued to perform work "at the facility" after an obligation to contribute ceased, i.e., who continued to have the same productive operations performed, albeit by outside workers. Under the law of this case, the work performed by outside contractors would nevertheless be "the product of the same facility."

App. A, at A12. In fact, an employer who simply shifted its operations into a new building across the street but continued to utilize a small amount of union work would avoid liability, even if it retained all the same employees and continued the same level of production. Similarly, liability could not be imposed where the union had been decertified, as long as another agreement still required contributions elsewhere. In short, there would no longer be any withdrawal liability in cases such as *H. C. Elliott, Inc. v. Carpenters' Pension Trust Fund for Northern California, supra; Fraser Shipyards, Inc. & IAM National Pension Fund,* 7 EBC 2562 (Cornelius, 1986), and *Loomis Armored, Inc. and Central States Pension Fund,* 8 EBC 1899 (Tylove, 1987), where partial withdrawal liability has heretofore been imposed.

There can be no clearer application of the partial withdrawal rules than occurred in this case. Even under the lower court's expansive definition of "facility," the facts present a classic example of a partial cessation of the obligation to contribute wherein the obligation expires under less than all of an employer's collective bargaining or related agreements, but the employer continues to perform work in the jurisdiction or transfers the work to another location.

Indeed, some courts have recognized a partial withdrawal on the basis of the exclusion of a significant number of participants, particularly in connection with a major corporate event such as the elimination of a division or a plant closing. For example, in *Weil & Galuppo v. Retirement Plan Administrative Committee of the Terson Co., Inc. et al.,* 750 F.2d 10 (2d Cir. 1988), the court remanded the case for a determination of whether the employer had dismissed "a significant num-

ber" of employees in closing part of its operation, thus triggering a partial withdrawal. The district court, on remand, found that a partial termination had occurred in connection with dismissal of 33% of the employees following relocation and closing of several divisions. No. 82 CIV 8468 (S.D. N.Y. 1988), App. KK, at A321.

Not only is the language of the partial withdrawal and exemption sections similar, but the parties are in agreement that the two sections are to be interpreted and applied in the same manner. App. MM, at A333. A transfer of work to non-contributory sources such as occurred here triggers both sections and should have been applied as such by the lower court.

The decision below also affects other sections of ERISA. For example, its definition of a facility closing directly affects a plan's duty to notify the PBGC of a "facility shutdown," currently a reportable event under ERISA §4062(f). Since such events generally indicate a possible danger of termination of a defined benefit plan insured by the PBGC, eliminating the reportable status of such an event could be disastrous. In short, the decision below is detrimental to other portions of the statute and cannot be permitted to stand.

III. The Decision Below Raises Important Questions Regarding the Right of a Fund to Refuse to Apply the Collective Bargaining Agreement Exemption of ERISA §4217(a)(1) When the Stipulated Facts Show Cessation of the Obligation to Contribute for Work Performed Under Such an Agreement Before MPPAA's Effective Date.

Separate relief is available under subpart (1) of §4217(a) for contributions allocable "to work performed

under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980." Although finding that Barbizon did cease to have an obligation to contribute for the Provo plant after June 30, 1980, the lower court nevertheless concluded that Barbizon remained bound under the Master Agreement to contribute for whatever other operations it continued to engage in. App. A, at A8. This conclusion cannot be squared with the undisputed facts or the clear statutory language.

The stipulated record shows that the 1977-80 Master Agreement expired on February 1, 1980, and that another Master Agreement was not agreed upon until June 19, 1981, nearly a year after Provo had closed under the terms of the June 24 agreement and a year and a half after the prior Master had expired. App. V, Z, at A198-200, 218. Therefore, during the pertinent period, the only agreement in effect was the June 24 Agreement. The obligations with respect to other operations referred to by the lower court did not even come into existence until over a year afterwards. At the very least, there is an issue of fact as to when such obligations arose and expired.

Moreover, there is nothing in the statute requiring that all obligations to contribute expire under all agreements before the exemption can be applied. The statute plainly excludes contributions allocable to work performed "under *a* collective bargaining agreement for which there was a permanent cessation of the *obligation to contribute* before September 26, 1980." "Obligation to contribute" is defined as an obligation arising "under one or more collective bargaining (or related) agreements." 29 U.S.C.

§1392(a). Similarly, the partial withdrawal rules require that the obligation expire "under *one or more but less than all* of an employer's collective bargaining or related agreements." 29 U.S.C. §1385(a). Therefore, under clear statutory language, it does not matter that there may have been other obligations involving other operations. As long as the obligation to contribute for the Provo plant had ceased (as found by the lower court), then there was a "permanent cessation of the obligation to contribute" for "work performed under a collective bargaining agreement," entitling Barbizon to relief.

There is no disagreement that the exemption would apply if the employer's overall obligation was established by more than one collective bargaining agreement. In that case, cessation of the obligation under one of those agreements prior to MPPAA would invoke §4217(a)(1). Significantly, the Fund admitted in a letter sent to counsel for Barbizon in 1982 that Barbizon's obligation was indeed established by more than one collective bargaining agreement. App. P, at A80. The Fund has thus admitted that Barbizon is entitled to this relief.

Even the agreements themselves demonstrate that there was an obligation to contribute under more than one collective bargaining agreement, and that in any event, the June 24 Agreement (under which the obligation with respect to the Provo plant ceased) took precedence over the Master Agreement in question. Thus, the 1980-83 Master Agreement did not contain any obligation to contribute a defined amount to the Fund. App. V, at A179-183. Article XXIX(1)(b) provided that the employer was to make payments set forth in the applicable plant supplemental agreements. App. V, at A179. Moreover, Article XXXVIII underscored this principle by stat-

ing that "[w]here a plant supplemental agreement provides terms which differ from those of this Master Agreement the provisions of the plant supplemental agreement shall govern." *Id.* at A192. Clearly, then, not only was any obligation dependent upon the June 24 Agreement, but the June 24 Agreement took precedence under the provisions of the 1980-83 Master Agreement.

The June 24 Agreement specifically provided for the termination of any obligation with respect to Provo after June 30, 1980. The obligation to contribute ended with respect to Provo at that time, and this was specifically reinforced by the subsequent 1980-83 Master Agreement. Thus, there was a permanent cessation of the obligation to contribute for work performed under a collective bargaining agreement prior to the effective date of MPPAA. The lower court therefore should have applied the exemption as stated in §4217.

CONCLUSION

For these reasons, Barbizon respectfully urges this Court to issue a writ of certiorari to the Court of Appeals for the Second Circuit and to accept this case for review.

Respectfully submitted,

JAMES W. WIMBERLY, JR.
Counsel of Record for Petitioner
The Barbizon Corporation

WIMBERLY, LAWSON & COBB
Suite 1750, Lenox Towers
3400 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 365-0900